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RES IPSA LOQUITUR.

Some actions for negligence are found in the books in which it is said that the mere happening of the accident, without more, is *prima facie* evidence of negligence—that is, sufficient to take the plaintiff's case to the jury unless the defendant overcomes this *prima facie* evidence by evidence on his part. This statement is believed to be inaccurate. It is believed that there are no cases, not resting in contract, where proof of the mere fact that an accident happened to the plaintiff, without more, will constitute evidence of negligence.¹

We believe that the true principles in these cases are these:

1. In cases not resting in contract, in order to make out a *prima facie* case, it must not only appear that the accident happened, but the surrounding circumstances must be such as to raise a presumption that it happened in consequence of a failure of duty on the part of the defendant towards the plaintiff.²

2. In cases where the defendant was under a contract, express or implied, to protect the plaintiff from the injury or damage which happened to him, proof of the bald fact that such injury or damage did happen to the

¹ It may be here remarked that the term "evidence of negligence" refers to the value or sufficiency of evidence, and not to its relevancy. Whatever evidence is sufficient to take a case to the jury is termed evidence of negligence. Of course this evidence must tend to prove negligence—that is, it must be relevant. If there is no evidence of negligence the judge, according to the practice of the particular court, directs a nonsuit or a verdict for the defendant.

² We may here remark that the term "negligence," as now used in the books of the law, has a wider meaning than want of care. It means a failure of duty. In every case in order to constitute what is termed evidence of negligence, it is conceived that it must appear: 1. That there was a duty on the part of the defendant to protect the plaintiff from the particular injury which happened to him; 2, that the defendant failed to perform this duty; 3, that damages resulted to the plaintiff from such failure. In this last condition is involved the further condition that there must have been a proximate connection between the defendant's failure to perform the duty and the damages which resulted to the plaintiff from such failure.

plaintiff, without any evidence as to how it happened, will operate to charge the defendant; because it will be *prima facie* evidence of a breach of the defendant's contract.

Let us illustrate these two propositions.

1. As to cases not resting in contract. A leading and most interesting case on the subject is that of *Kearney v. London & Brighton R. Co.*³ In this case the defendant company had a bridge crossing a public highway. It was a girder bridge resting on a perpendicular brick wall with pilasters. A brick fell from the top of one of the pilasters and struck and injured the plaintiff while passing along the highway. There was no evidence from which any rational conjecture could be formed as to how the brick came to fall. It was held by the Court of Queen's Bench, and afterwards by the Court of Exchequer Chamber, that the railway company must pay damages to the plaintiff. Lord Cockburn, who delivered the judgment of the Queen's Bench, thought that it was a case for the application of the principle *res ipsa loquitur*, though it was about the weakest case for the application of that principle which could well be conceived. It is perfectly obvious that this was not a case where the plaintiff recovered damages upon the mere proof that the accident happened to him without more. The railway company was under a duty so to construct the bridge in question and so to keep it in repair that it would not injure travelers lawfully using the highway; it being alike the law of England and America that whenever a person or corporation, for his or its private gain or advantage, obstructs the public highway, he or it is bound, so to bridge the obstruction and keep the bridge in repair, as to leave the highway in substantially the same condition as to convenience and safety as it was in before the making of the obstruction.⁴

Let us take another case. The plaintiff

³ L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; s. c. 2 Thomp. on Neg. 1220.

⁴ 1 Thomp. on Neg. p. 343; *Dyert v. Schenck*, 23 Wend. 446; *Rex v. Kent*, 13 East, 220; *Rex v. Lindsey*, 14 East, 317. Compare *Meadville v. Erie Canal Co.*, 18 Pa. St. 66; *Dow Bridge v. Le Prior*, 1 Roll Abr. 368, tit. "Bridges," Pl. 2; *Phoenixville v. Phoenix Iron Co.* 45 Pa. St. 135; *Perley v. Chandler*, 6 Mass. 454; *Woodring v. Fork's Township*, 28 Pa. St. 355; *Hays v. Gallagher*, 72 Pa. St. 136; *Duffy v. Chicago etc. R. Co.* 32 Wis. 269; *Roberts v. Chicago etc. R. Co.* 35 Wis. 679.

while walking along the street is struck and injured by some substance falling upon him. Suppose he were to sue B for the injury, and should come into court with no other evidence than that just stated. Obviously he could not recover damages of B; for the evidence would not tend in any way to connect B with the injury, much less to show that B had violated any duty towards A. This would be no case for the application of the principle *res ipsa loquitur*; and the very statement of the case refutes the idea that there can be, in any non-contractual relation, any case where the mere happening of the accident affords evidence of negligence. But suppose the evidence goes further and shows that the substance which struck A was a barrel of flour; that B was the occupier of two warehouses which abutted the highway, and which were used by him for storing flour; and that this barrel of flour fell from one of the windows of B's warehouses. This, it has been held, would be *prima facie* evidence of negligence sufficient to charge B, in the absence of any evidence on his part tending to exonerate him. This is so although the evidence fails to show whether, at the time the barrel of flour struck the plaintiff, it was being lowered from a window by the servants of B, or whether it fell out by reason of having been negligently stored in the warehouse, or whether it was being lowered by other persons than the defendant's servants, or whether it was rolled out by trespassers.⁵

In another English case an officer of customs was at the defendant's docks in the discharge of his duty. While passing from one door-way of the defendant's warehouse to another he heard the rattling of chains, and six bags of sugar fell on him. There was no other evidence. It was held a case for damages.⁶

Another English case is quite similar. The plaintiff, while making an inquiry at the door of a house in which the defendant had offices, received a push from the defendant's servant, who was watching a packing case of the defendant's which was propped against the wall of the house. At the same time the packing

case fell upon the plaintiff's foot injuring him. There was no evidence to show how the packing case came to fall, or who placed it against the wall. It was held by Bramwell and Pigott, BB., on the authority of the two preceding cases (Martin, B., dissenting), that the fact that the packing case fell was *prima facie* evidence of its having been set up improperly, and that there was hence evidence of negligence in the defendant to go to the jury.⁷

In another case it appeared that the plaintiff was lawfully on a public street when an adjoining building fell down, injuring him. In a suit against the owner of the building, he made out his case by showing the facts stated, without more. The reason was that the owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it be kept in a safe condition, so that it will not fall into the highway, injuring persons lawfully there. If it does so fall, every fair minded man would draw the inference that it had not been properly inspected and kept in repair; and if the contrary were true, it is easy for the defendant to show that fact.⁸

In another case, it appeared that the defendants, who occupied for business purposes the second and upper floors of a building, were hoisting a box, weighing about five hundred pounds, to their rooms, by means of iron hooks attached to its sides. Just as it reached the second floor, the hooks broke, and the box fell, broke through the hatchway on the first floor, and struck and injured the plaintiff, who was lawfully in the basement. This, without more, was held evidence of negligence on the part of the defendants, warranting a verdict for the plaintiff.⁹ So, proof of the fact that water escaped from the defendant's hydrant into the plaintiff's apartment, in the story below, makes out a *prima facie* case of negligence, which the defendant must excuse or pay damages.¹⁰

The defendant, in another case, was under an obligation to keep a bridge in repair, but

⁵ *Byrne v. Boadle*, 2 Hurl. & Colt. 722; s. c. 33 L. J. (Exch.) 13; 9 L. T. (N. S.) 450; 12 W. R. 279.

⁶ *Scott v. London etc. Docks Co.* 3 Hurl. & Colt. 506; affirming a *pro forma* judgment of the court below in the same case, in 10 Jur. (N. S.) 1108.

⁷ *Briggs v. Oliver*, 4 Hurl. & Colt. 403; s. c. 35 L. J. (Exch.) 163; 14 L. T. (N. S.) 412; 14 W. R. 658.

⁸ *Mullen v. St. John*, 57 N. Y. 567, (able opinion by Mr. Commissioner Dwight). See also *Vincett v. Cook*, 4 Hun, 318.

⁹ *L. yons v. Rosenthal*, 11 Hun, 46.

¹⁰ *Warren v. Kaufman*, 2 Phila. 250 (Sup. Ct., Pa., opinion by Lowrie, J.)

had suffered it to get out of repair. The plaintiff was found lying under the bridge at midnight on a dark night, hurt. He made no other statement than that he had fallen from the bridge. There was no evidence as to how he came to fall from it. He was in court at the trial, but neither party called him as a witness. It was held that there was evidence of negligence for the jury. Presumptively he fell from the bridge by reason of its having no railings.¹¹ So the fact that a telegraph wire is found swinging across the highway so low as to interfere with a traveler's horses is, unexplained and unaccounted for, some evidence of negligence to charge the company with damages sustained by the traveler whose horses have become entangled therein.¹²

On the other hand, a case is found where it appeared that the defendant was possessed of a workshop, the window of which overlooked a yard in which the plaintiff was engaged in the service of his employer. A ladder in the defendant's workshop fell through one of the windows, and the fragments of glass, in falling, injured the plaintiff's eye. It was not shown that the ladder was under the control of the defendant or his servant. It was held that there was no evidence of negligence to go to the jury. The fact that a ladder falls through a person's window is not, in the view of Erle, C. J., an event occurring in the course of the defendant's business, or in the management of his household. Smith, J., said: "If we were to decide in the plaintiff's favor, and hold that an accident of this kind was in itself *prima facie* evidence of negligence on the defendant's part, we should be throwing a very great burden on the owners of houses."¹³ So, it was held in the Superior Court of New York, but on grounds which we must think doubtful since the decision of the Commission of Appeals in *Mullen v. St. John*,¹⁴ that evidence of the mere fact that a rock fell from the bank of the defendant's canal upon the plaintiff's canal boat, was not, without more, sufficient to charge the defen-

dant with damages, although it is presumed that the defendant was under an obligation to keep the canal in repair.¹⁵

Now these cases suggest two thoughts: 1. They suggest the propriety of what was said by Erle, C. J., in giving the judgment of the Court of Exchequer Chamber, in *Scott v. London, etc., Docks Co.*, "that there must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."¹⁶

2. They suggest that considerations connected with the burden of proof have sometimes an important bearing on these questions. It is true that ordinarily there is no very direct connection between the legal value of certain facts and the question as to which party is bound to prove those facts. But where, as in the cases already cited, the circumstances surrounding the accident which the plaintiff is able to show are meager, and the defendant, from the very nature of his situation, is presumptively able to explain them fully, and yet fails to offer any explanation, the question becomes, to some extent, a question of juridical policy. The courts, to prevent a failure of justice, and for reasons which commend themselves to the good sense of everyone, say to the defendant: "It appears, from your situation, that you are able to explain what the facts surrounding this accident actually were. It is right, then, that you should explain them; and unless you do explain them, or show your inability to do so, it will be presumed that, if explained, they would make against you, and that you are withholding them for that reason; and if you decline to explain them, you must accept such explanations of them as the law can give, and pay damage to the plaintiff."

2. As to cases resting in contract, we will close with one or two illustrations of the principles stated. A telegraph company receives a message to transmit, and either fails to de-

¹¹ *Hays v. Gallagher*, 72 Pa. St. 136. Opinion of the court by Sharswood, J.

¹² *Thomas v. Western Union Tel. Co.*, 100 Mass. 156.

¹³ *Higgs v. Maynard*, 12 Jur. (N. S.) 705; s. c. 1 Harr. & Ruth. 581; 14 Week. Rep. 610; 14 L. T. (N. S.) 332.

¹⁴ 57 N. Y., 567.

¹⁵ *Lane v. Salter*, 4 Robt. 239. Compare *Worster v. Forty-Second Street R. Co.*, 50 N. Y. 203.

¹⁶ *Scott v. London, etc., Docks Co.*, 3 Hurl. & Colt. 596.

liver it to the person to whom it is directed, or delivers it incorrectly. In an action by the sender for the resulting damages, this, unexplained, is sufficient evidence to charge the company with liability.¹⁷ A carrier undertakes to carry a passenger from one place to another. While in the carriage, in transit, some unknown substance strikes and injures him, he being in the proper place in the carriage, and in the exercise of due care. The passenger makes out a case for damages against the carrier, without other proof than that the accident thus happened; the carrier must show that it did not happen through the negligence of himself or his servants, or pay damages.¹⁸ So, if the vehicle in which the passenger is being conveyed under the contract of carriage, breaks down, injuring the passenger, he being without fault, this, without more, will be sufficient evidence to support an action by the passenger against the carrier; the passenger need not show how the vehicle came to break down, for presumptively, it was through the carrier's negligence. The carrier must show, in order to excuse himself, that it was an accident of such a nature that the high degree of care which the law requires of carriers would not have availed to prevent it.¹⁹

CONTRIBUTION AMONG SURETIES.

It is universally admitted that sureties for the same debt or obligation must divide the loss between themselves, though they are liable on obligations of different dates and with different penalties, even though one bond was given without the knowledge of the sureties on the other bond. It is admitted there may be equities between the bonds or between the sureties themselves, which may vary the rule of contribution, but we propose to consider only the general rule—where there are no equities between them, and where each bond was intended to cover the whole debt or obligation. We will suppose an extreme case so as to include the whole question: A, an officer, gives a bond in a penalty of \$100,000 with B, C, D and E, as his sureties, conditioned that he will

faithfully discharge the duties of his office. He subsequently gives a similar bond in \$60,000 with B, F and G as his sureties. He becomes a defaulter to the extent of \$80,000, which some of his sureties pay, now how shall they distribute the loss between themselves? Say further, that prior to the defalcations E and D became insolvent, and have not paid any of the loss and are still insolvent.

Judge Story (1 Story Eq. § 497), says, and so do the text-books generally, that the sureties contribute in proportion to the penalties of their respective bonds. We think that this is an error, caused by a misapprehension of the leading and first case, to which we will subsequently refer. We believe the true rule to be this: The solvent sureties for the same debt or obligation, though bound by deeds with different penalties and executed at different times, must between themselves contribute equally to discharge the debt or obligation, provided that no surety or sureties can be required to pay more than his or their deed has rendered him or them liable for; the excess, if any, must be borne in the same manner by those further liable.

In the case supposed B, C, F and G, would each pay \$20,000, since the payments of F and G do not exhaust the bond on which alone they are liable. Now if there is any inequality among the sureties by reason of the different penalties, such inequality can not arise by reason of any contract between the sureties on the subject of contribution, since no contract exists among the sureties on that point—in fact there is no contract of any kind between the sureties. The only contract is to the obligee of the bond. "The right of contribution among sureties is not founded in contract, but is the result of principles of equity on the ground of equality of burdens and benefits." *Oldham v. Broom*, 28 Ohio, St. 41; *Van Petten v. Richardson*, 68 Mo. 380; *Claythorne v. Swinburne*, 14 Vesey Ch. 169; *Wells v. Miller*, 66 N. Y. 255; *Brandenburg v. Flynn's Adm'r*, 12 B. Mon. 399; *White v. Banks*, 21 Ala. 712; *Stirling v. Forester*, 3 Bligh, 590; 1 Story's Eq. Jur. § 493; *De Colyar Guar. Prin. and Sur.* 339. [Am. notes by Morgan.] So if there is any inequality, it must proceed from some principle of equity. But "equality is equity;" or, as it is sometimes expressed, "equity delighteth in equality." 1 Story's Eq. § 64. "Equality of burden as to a common right is equity." *Campbell v. Mesier*, 4 Johns. Ch. 338. "For as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim, *Qui sentit commodum, sentire debet et onus*. And the doctrine has an equal foundation in morals; since no one ought to profit by another man's loss, where he himself has incurred a like responsibility." 1 Story's Eq. § 493. "In this equity is synonymous to justice." 3 Black. Com. 429. "Those who voluntarily assume a common burden should bear it in equal proportions," which is a "principle of natural justice." *White v. Banks*, 21 Ala. 712. Speaking of contribution it is said: "Courts of law have

¹⁷ *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Rittenhouse v. Independent Tel. Co.*, 44 N. Y. 263; *Tyler v. Western Union Tel. Co.*, 60 Ill., 440; *Bartlett v. Western Union Tel. Co.*, 62 Me. 509; *Baldwin v. United States Tel. Co.*, 45 N. Y. 751.

¹⁸ *Holbrook v. Utica etc. R. Co.*, 16 Barb. 113.

¹⁹ See *Ingalls v. Bills*, 9 Met. 1; *Hegeman v. Western R. Corp.*, 13 N. Y. 9; *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 417; s. c., L. R. 4 Q. B. 379.

borrowed their jurisdiction on this subject from courts of equity; and along with it they have taken the maxim that equality is equity." *Norton v. Coons*, 3 Denio, 130. "The doctrine of contribution was first established and enforced in equity. It rested upon and resulted from the maxim, that equality is equity." s. c. 6 N. Y. 40. "From the hypothesis alone it would seem to follow that where several are joined for the same common end and purpose the burthen ought to be borne equally, although they may have become bound at different times and by different contracts." *Harris v. Ferguson*, 2 Bailey (S. C.) 397.

Now in the case supposed F contracted to be liable for \$60,000. He has paid \$20,000, and has been relieved by the payments of his co-sureties from paying the rest of his bond. G is in the same position. C is in the same position, except that he agreed to be liable if necessary to A's creditors to the extent of \$100,000. B is in the same position, except that he agreed to be liable, if necessary, to A's creditors to the extent of \$160,000. Now, it is proposed to hold B for an unequal contribution, the only intelligible way to argue the question is to state the proposition as though B had signed a separate bond for \$160,000; for the inequality claim is not based on the idea that he signed with F and G, but on the theory that he made himself liable for a larger amount than they did; nor is it based on the idea that F, G and B in signing the second bond said we will each pay, if necessary, one-third thereof, for the contract is that each will pay all of it to A's creditors if his default should render it necessary.

Now each made the contract with A's creditors. They made no contract with each other. They did not sign to oblige each other but to oblige A, nor did they expect or contemplate ever being called on to pay a cent. Then if there is a loss, their claim between each other is based solely on equity, which aims to act solely by justice; that is, unless a contract intervenes to control it (and there is no contract here between the sureties), it is no respecter of persons, and regards all alike and "equality is equity."

Again B was as much bound to pay A's defaults after he signed the first bond as though he had signed a dozen bonds. The creditors of A received no increased security as to B by his signing the second bond, unless the defalcation exceeded the penalty of the first bond, \$100,000. Now if the creditors for whom all this was done are not benefited, why should the sureties be benefited, especially as they claim through the contract with the creditors or through an equity growing out of it? Why should the accident be greater than the substance? Unless the defalcation exceeded the penalty of the first bond (\$100,000)—and it does not—B's signature to the second bond became an idle act, and yet F and G claim that the pure spirit of equity demands from B a heavy sacrifice by reason thereof for their benefit.

Again, because B has stood by his friend, and by reason of that act of friendship may be required

to pay more money to A's creditors than can be demanded from F or G, is that any reason why B should be required to suffer that they may gain; that they should be relieved of a burden they have assumed in order to put it on B's shoulders? Why should they come in and say—it is possible you may be more unfortunate than we, therefore we ought to be allowed to make you so anyhow, and be allowed to unload our burden upon your already equal burden? They were as much bound to pay this money as B was. A contract to pay is not made more binding because it is duplicated.

Let us see how the authorities look at this question. We have carefully examined all we could find in the text-books, annuals and latest decisions. Though the authorities are uniform and numerous to the effect that sureties on different bonds must contribute, yet the cases are scarce where there were two bonds, and some of those do not state the penalties of the bond; however we will refer to all we could find.

The case of *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270, is the case which first decided that the bondsmen on different bonds were co-sureties, and it is the case to which all other cases and the text-books point as their pole star. The pertinent part of the decision is in these words: "They are bound as effectually *quoad* contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if there were all joined in the same engagement they must all contribute equally. In this case Sir E. Deering, Lord Winchelsea and Sir J. Rous, were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are *in equali jure*, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent the third is obliged to contribute a full moiety. *This circumstance, and the possibility of being made liable to the whole, has probably produced several bonds.*" * * * *

"There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions. The decree pronounced was, that it being admitted by the attorney-general and all parties that the balance due was £3883 14s. 8 1-2d. the plaintiff, Sir E. Deering, and the defendants the Earl of Winchelsea, and Sir J. Rous ought to contribute in equal shares to the payment thereof."

Now this decision is ambiguous. It may mean that the sureties shall contribute in the proportion in which the penalties of the bonds are to each other, or it may mean, they shall contribute equally, but can not be called on to contribute beyond the penalties of their bonds. If it means the first proposition it is merely an *obiter dictum*, and there was no occasion for its utterance, for the case states that the bonds were equal.

But we maintain it means that the sureties must

contribute equally, from its phraseology and from the fact that all the bonds were stated to be equal, and also for the following reason: Lord Eldon, who represented the defendant in this case and lost it, as Lord Chancellor, says in *Claythorne v. Swinburne*, 14 Vesey, 160, commenting on this case:

"It was contended for the first time in *Deering v. Earl of Winchelsea*, that there is no difference whether the parties are bound in the same or by different instruments, provided they are co-sureties in this sense for the debt of the principal; and further, that there is no difference if they are bound in different sums, except that contribution could not be required beyond the sums for which they had become bound. I argued that case, and was much dissatisfied with the whole proceeding, and with the judgment; but I have been since convinced that the decision was upon right principles." (p. 169). * * * * "And it was decided that there is no distinction whether they are bound in the same obligation or by several instruments." * * * * "If the relation of surety for the debtor is formed," * * * * "it is decided that whether they are bound by several instruments or not; whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases, upon the maxim that equality is equity." (p. 163). "It was admitted in that case that one bond being for 10,000*l*, and the surety having paid it, Lord Winchelsea having executed a bond for 4000*l* only, though he was a surety, yet he had by contract taken himself out of the reach of the 6000*l*, and was liable only to the extent of 4000*l*." (p. 165.)

We find the same view held in 1 *White & Tudor's Leading Cases* (Wallace & Hare's notes) 135 side paging 84 *et seq.* (Law Lib. Vol. 63, side paging 60 *et seq.*), where all the cases are reviewed, and where in similar cases there is no suggestion of inequality. Judge Redfield in his edition of *Story's Eq. Juris.* (Redfield's Ed. p. 483 § 497 a) says: "It may be questioned whether the more recent decisions in courts of equity justify any such discrimination between sureties for the same debt, by different bonds with different sums as penalties, unless where the purpose of the different sums in which the sureties are bound is to show that the obligor incurs the hazard of only a portion of the debt, or a portion of what the other sureties assume." In his note to this section, referring to *Deering v. Winchelsea*, he says: "We infer, therefore, that the difference between the penalties of the bonds will make no difference, provided each exceed the debt, or the purpose of each is to bind all the sureties to the extent of the whole debt."

In the supposed case at bar each bond is conditioned that A shall faithfully discharge all the duties of his office, which was the only debt in the case, so they were both intended to cover all the debt.

In North Carolina a sheriff gave a \$10,000 bond to collect special taxes; he also gave a \$21,000 bond to collect taxes. For his failure to pay special taxes several sureties on the small bond

and one on the large bond was jointly sued. Held, that the defendants as between themselves were liable share and share alike, and there should be no contribution or any other basis. *Cherry v. Wilson*, 78 N. C. 164; *Cherry v. Wilson*, 78 N. C. 166. In Tennessee a guardian gave two bonds at different times for the same duty. The amount of the bonds is not given in the decision. Held, the two sets of sureties are co-sureties and were liable equally. No distinction was made between the two bonds. *Odum v. Owen*, 58 Tenn. 453. A surety on one bond sued two sureties on another bond for contribution. The amount of the bonds not given. Held, the three should bear the burden equally—no distinction is made on account of two of the sureties being on one bond and only one surety on the other. *Bosley v. Taylor*, 5 Dana (Ky.) 158. Exactly similar is the case of *Ketler v. Thompson* 13 Bush. 287. A sheriff gave bond as such with six sureties, he afterwards gave an additional bond with four sureties, and then a bond with one surety. All these bonds were for his faithful conduct, no penalty mentioned in any of them. Held, on suit for contribution, that no evidence of any being insolvent, the ratio of contribution was one-eleventh to each surety. *Harris v. Ferguson* 2 Bailey, L. R. (S.C.) 397. One surety on one bond, and two on the second, held "equally liable, as much as if they had been parties to the same bond." *Bentley v. Harris*, 2 Gratt (Va.) 358. In the only case arising in Missouri on unequal bonds the court suggested that the contribution would be equal, but the point was not directly before the court and was not passed on finally. *State v. Fields*, 53 Mo. 474.

The only cases we find which adopt the rule of inequality are as follows: It was decided in North Carolina, in 1843, that the sureties should contribute by dividing the loss between the two bonds according to their penalties. *Bell v. Jasper*, 2 Ired. (N. C.) Eq. 597. This case quotes as its only authority *Deering v. Winchelsea*. This case was followed subsequently by *Jones v. Hayes*, 3 Ired. Eq. 502; *Jones v. Blanton*, 6 Ired. Eq. 115. But they are all flatly overruled, and the rule of equality adopted in *Cherry v. Wilson*, 78 N. C. 164, and *Cherry v. Wilson*, 78 N. C. 166. A case was decided in New York in 1868 (*Armitage v. Pulver*, 37 N. Y. 494), where a deputy being required by the sheriff to give him a bond for \$20,000, gave one for \$18,000 and one for \$2,000. The court, in commenting on Judge Redfield's statement, *supra*, that the contribution is equal, where the purpose of each bond is to bind all the sureties to the extent of the whole debt, says: "The converse of this supposed qualification is, that where the penalties respectively are less than the whole debt, or the purpose is not to bind all the sureties to the extent of the whole debt, actual or contingent, the contribution will be proportioned to the burden assumed by each *i. e. pro rata*. That is the present case. Each assumed a part, and only a part, of the responsibility, and they should stand whatever is lost thereby in the proportion in which they took the hazard of the

aggregate whole" (page 500). So this case is not in conflict with our proposition, because the bonds respectively did not assume the whole risk.

The above cases are the only ones which we can find, which any one can suppose conflict with our proposition, and of these four, one is in harmony and the other three are overruled. It is true a number of text-books and cases, where the matter is merely *obiter dicta*, say that sureties must contribute in proportion to the penalties of the bonds, or they contribute proportionally to the amount for which each is surety, and give *Deering v. Winchelsea* as their authority, but this arises from their misconception, as we believe we have shown, of the court's meaning when it says the penalties of the bonds fix the proportion. The language is careless, and instead of "fix" they should have used "limit." The three cases in North Carolina decreed unequal contribution, but as shown they have been overruled, and are no longer authorities, and we believe no other cases have decreed unequal contribution where the obligation was intended to cover the whole debt.

Suppose it is held that there is unequal contribution between the bondsmen, then under what theory will the contribution be made? Now, whatever rule is adopted, it is adopted because it is equitable, and the equity arises from the existence of the bonds, and does not grow out of the sum of money the securities have paid. Therefore the rule adopted must be equitable for each case which might arise under similar bonds. To determine whether a rule is equitable, it is well often to push it to its conclusions and illustrate it by practical application.

In case of unequal contribution three modes have been suggested as possible, which we will severally review:

1. Credit all B's payments on the first bond. That is contrary to equity, for these reasons: In the matter of contribution the two bonds are one. "They are bound as effectually *quoad contribution* as if bound in one instrument." *Deering v. Earl of Winchelsea* 2 Bos. & Pul. 270. "And it was decided that there is no distinction, whether they are bound in the same obligation or by several instruments." *Craythorne v. Swinburne* 14 Ves. 165. Both bonds are one and the solvent sureties in each bond shall equally bear the burden. *Bosley v. Taylor*, 5 Dana (Ky.) 159. The rights and obligations of the sureties *inter se* are the same whether they are bound under one or several obligations. *Armitage v. Pulver* 37 N. Y. 498. Sureties on two bonds held "equally liable as much so as if they had been parties to the same bond." *Bentley v. Harris*, 2 Gratt. (Va.) 358. "It is a general rule of equity that all persons liable for the same debt, although by different obligations, executed at different times, are regarded as co-sureties, and will be compelled to contribute to the payment of any loss that a co-surety may sustain by having discharged the debt." *Kellar v. Williams* 10 Bush. 218. No authority sustains this rule. Again suppose C were suing F and G, would C as being only on the first bond, have the benefit of this

payment, or could C set it off against a suit by them? Or suppose F were suing G, should not G have any benefit of B's payment? Or if C sued B, how then? Or suppose B's were the only payments made, could he sue F or G? Such a rule decides that the two bonds are not jointly interested in nor benefited by a payment for which they are jointly liable.

2. Proportion the payments between the two bonds according to their penalty, and then divide the sum allotted to each bond among the sureties thereon. Now contribution is a matter of equity, and it is admitted the sureties on all the bonds are co-sureties together. Now no surety guarantees to any other surety the solvency of a third surety, consequently, if one surety becomes insolvent, his proportion of contribution is distributed among all the solvent sureties. It is admitted that two of the sureties on the first bond (D and E) are insolvent. "Thus, if there are four sureties, and one is insolvent, a solvent surety, who pays the whole debt, can recover only one-fourth part thereof (and not a third part) against the other two solvent sureties. But in a court of equity, he will be entitled to recover one third part of the debt against each of them; for in equity the insolvent's share is apportioned among all the other solvent sureties." 1 Story's Eq. § 496; *Von Petten v. Richardson* 68 Mo. 379. "And the latter case settles that those of the sureties in each bond, who are solvent, shall be made equally to bear the burden." *Bosley v. Taylor* 5 Dana (Ky.) 159. "If any of them should prove insolvent, the contribution must be in the ratio of those that are solvent," *Harris v. Ferguson* 2 Bailey Law (S. C.) 397. In equity the amount of contribution is regulated by the number of solvent sureties. *De Colyar Guar. & Prin. & Sur.* 349 (American notes by Morgan). *Brandt Sur. & Guard.* 252 and cases cited. In fact all the decisions and all the text books agree on this proposition. It follows that to divide the payments between the two bonds in proportion to the penalties, and to make B and C pay that sum, would be to make them alone pay all the money that D and E should pay, whereas all the authorities decide that F and G should bear part of the burden.

To the same effect are the many cases already quoted, where the bonds had no penalty, but the number of securities on the several bonds was different, and they were all required to pay equally. *Ketler v. Thompson*, 13 Bush. 287. *Harris v. Ferguson*, 2 Bailey, Law (S. C.) 397; *Bentley v. Harris*, 2 Gratt. (Va.) 358; to the same effect also are *Cherry v. Wilson*, 78 N. C. 164; *Cherry v. Wilson*, 78 N. C. 166.

3. Let the sureties each pay in proportion to the penalties of the bonds on which he is held, that is F on the basis of six, G six, C ten and B sixteen. We have tried to combat the text-books and *obiter dicta* which adopted this rule, there being no decision in favor of it. But let us apply it to a case a little different, for as a rule it must fit all cases coming under it. Suppose the bonds and bondsmen were as at present, except that B was on neither bond, thus leaving the other three, and

the amount paid was \$150,000. Let us distribute this money under the rule:

C pays 22:10:: \$150,000: his payment, which is \$68,181.82; F pays 22:6:: \$150,000: his payment, which is \$40,909.09; G pays 22:6:: \$150,000: his payment, which is \$40,909.09. Total, \$150,000. That is F and G together pay \$81,818.18, or \$21.818.18 more than their bond, which is absurd. No case where the point was involved, has decided in favor of this idea. The three North Carolina cases and the New York case, while professing to act under this rule, proportioned the loss between the bonds according to their penalties, and not among the sureties. So the whole theory of unequal contribution falls to the ground. In fact it arises from a ghost which will intrude into men's minds, namely, contract. But we see that contract has nothing to do with it. The contribution contemplated when the bond was signed, if contemplated at all, is varied by the number who remain solvent; again it is varied by the solvent sureties on other bonds, of whose existence even the surety may not have heard till just before he brings suit for contribution.

JOINT DEBTORS — SURVIVAL OF CAUSES OF ACTION:

—
MCCOY v. PAYNE.

Supreme Court of Indiana, March, 1880.

Under the statutes of Indiana the estate of a deceased joint debtor is liable even where the relation of principal and surety exists, and the debtor whose estate is to be charged is the surety.

Howk, C. J., delivered the opinion of the court:

The question is presented for decision, whether or not, under the law of this State, upon the death of one who had signed as surety only a joint, but not several, promissory note, the estate of such deceased surety would be discharged on his death, from any and all liability on such note.

It may be conceded that the law was and still is, unless changed or modified by statutory provisions, that the estate of a surety bound jointly, but not severally, with his principal, upon a promissory note or other written contract, is absolutely discharged from all liability on such note or contract, upon his death, and the survivor or survivors are alone responsible thereon. *Getty v. Binsse*, 49 N. Y. 385; *Wood v. Fisk*, 63 N. Y., 245; *United States v. Price*, 9 How. (U. S.) 90; *Pickersgill v. Lakens*, 15 Wall., 140; and *Fielden v. Lakens*, 6 Black., 524. It seems to us, however, that the law as thus stated has been completely changed by legislative enactments in this State. In the case of *Getty v. Binsse*, *supra*, the law as it existed, unless changed by statute, is thus stated: "It is a well settled principle that, in case of a joint obligation, if one of the joint obligors die, his representatives are at law discharged, and the survivor alone can be sued." It is certain, we

think, that this principle has not been the law in this State for many years, for in sec. 70 of "an act providing for the settlement of decedents' estates," etc., approved June 17, 1852, which section has never been repealed nor amended, it was and is provided, that "when two or more persons are bound in any joint contract, or in a judgment founded thereon, and either of them shall die, the proportionable part of such contract may be allowed against his estate." 2 R. S., 1876, p. 518.

There is more of this sec. 70, than what we have quoted, but the remainder of it constitutes an exception to what precedes it; and therefore, what we have already quoted may properly be regarded as the general rule, under the statute, applicable in all cases where one of two or more persons, bound in a joint contract or in a judgment founded thereon, shall die, unless the case falls within the single exception contained in said section of the statutes. This exception reads as follows: "Except where the relation of principal and surety exists, and, in that case, if the decedent be the principal, the whole of such contract shall be allowed against such estate." In the case now before us, under the allegations of the appellant's special answer, the relation of principal and surety existed between the joint-makers of the note in suit; and therefore, this case came within the exception contained in said sec. 70, and the general rule, above referred to, was not applicable thereto. But in this case, under the averments of said answer, the decedent was not the principal but the surety in the note sued on, and therefore, the exception in said sec. 70 failed to provide what should be done in such a case as the one now before us. If the decedent's estates act contained all the statutory law of this State, applicable to the case at bar as made by the averments of the appellant's special answer, we would be bound to conclude that the case was governed by the common law rule, as above stated; and that the estate of said Lewis McCoy, the deceased surety in the joint note sued on, had been and was, upon his death, absolutely discharged from all liability on said note, both at law and in equity.

It seems to us, however, that the practice act or code of practice approved June 18, 1852, which is a later law than the act providing for the settlement of decedents' estates, contains certain provisions which are utterly inconsistent, and can not be reconciled with the said common law rule on the subject under consideration. The common law of England is and always has been a part of the law governing this State, where the common law was not inconsistent with the fundamental law of either the United States or this State, or with the statutes of this State or the acts of Congress of the United States. Whenever such inconsistency exists the common law is superseded, and to the extent of such inconsistency no longer any part of the law of this State.

In the case now before us it can not be questioned, as it seems to us that if Lewis McCoy had been living at the time of the maturity and non-payment of the note in suit, it would have constituted a good cause of action against him,

whether he had been principal, surety or merely a joint maker of such note, in favor of the appellee as the holder thereof. If, in that case, the appellee would have had a valid cause of action on the note against Lewis McCoy, if living, then, it is certain, we think, that upon the death of said Lewis McCoy, the cause of action against him did not die with his person, but such cause of action, under the provisions of the practice act in such cases, survived against his personal representatives. Sections 782 and 783 of the practice act contain the following provisions in relation to "causes of action that survive," namely:

"Sec. 782. A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction and false imprisonment."

"Sec. 783. All other causes of actions survive, and may be brought by or against the representatives of the deceased party except actions for promises to marry." 2 R. S. 1870, p. 309.

Under these sections of the practice act, all causes of action founded on contract, except in the single case of a promise to marry, survive in this State, "and may be brought by or against the representatives of the deceased party." So the law is written, and so we think it ought to be construed. The General Assembly of this State have the unquestioned and unquestionable right and power to determine and declare by legislative enactment, what causes of action shall die with the person of the party, and what causes of action shall survive the death of the party, and in the event of survivorship, by and against whom the action shall be brought. In the sections last quoted of the practice act, the General Assembly of this State in the exercise of their right and power, have determined and declared that all causes of action founded on contract, with a single exception, shall survive, "and may be brought by or against the representatives of the deceased party." In the case at bar, the cause of action, stated in appellee's complaint, was founded on contract, and did not fall within the single exception; and, therefore, it follows clearly and conclusively, as it seems to us, that the appellee's cause of action did survive the death of said Lewis McCoy, and that this action might have been, and ought to have been, brought thereon against the personal representatives of said Lewis McCoy, deceased.

NOTE. — The trouble which the decision of this question caused the Indiana judges, will be seen by a reference to the case of *Hudelson v. Armstrong*, decided last January and reported 10 Cent. L. J. 89, and the accompanying note.

TAXATION—LIEN—ASSESSMENT.

UNITED STATES v. PACIFIC RAILROAD.

United States Circuit Court, Eastern District of Missouri, March, 1880.

1. Under sec. 3186 of the Revised Statutes, which provides that "if any person, bank, association, company or corporation liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid * * * upon all property, or rights to property belonging to such person, bank, association, company or corporation," the lien when it attaches relates back to the time when the tax was due, but does not attach to property transferred to innocent purchasers prior to demand.

2. An assessment is a prerequisite to the creation of a lien under the Revised Statutes where no return is made.

In equity. On demurrer.

W. H. Bliss, District Attorney, and *John P. Ellis* for the plaintiff; *M. C. Day* for defendant.

MCCRARY, Circuit Judge:

This is a bill in equity filed by the United States to enforce a lien upon property formerly owned by the Pacific Railroad for taxes amounting in the aggregate, including penalties, to something over \$135,000. The tax claimed as delinquent accrued during periods of time extending from July 1, 1864, to February 28, 1871, and is the income tax, or the tax upon the receipts and profits of said company during those periods. When the tax accrued the Pacific Railroad was the owner of the property against which the lien is sought to be enforced, but since that time several large mortgages have been executed upon the same, and under a foreclosure of one of these the property was on the 6th day of September, 1876, sold to one James Baker, who on the 21st day of October, 1876, conveyed the same to the Missouri Pacific Railroad Company, the present owner. The last named company mortgaged the property November 1, 1876, to secure bonds to the amount of \$4,500,000. The present owner as well as the several lienholders, are made parties, and the prayer of the bill is for a decree declaring the taxes aforesaid to be a lien on said property prior and paramount to any claim on their part, and for a foreclosure and sale. It is conceded that the tax was never assessed by any officer of the government, but it is insisted that this was not necessary because there was an assessment by operation of law which was equally effective. The bill avers that demands were made for the payment of the taxes claimed on the 2d of November, 1877, and on the 16th of July, 1879, both dates being subsequent to the execution of the several mortgages aforesaid, and also to the purchase of the property by the present owner.

The defendants demur to the bill upon the ground that the same constitutes no cause of action for the following among other reasons:

"That even if the complainant has a lien, it only took effect at the time the demand is averred to have been made, and so is subject to the title of

the mortgagees and purchaser represented by the defendants."

In considering the demurrer, we are called upon to construe the statute under which the lien is claimed. This statute is found in the act of July 13, 1866 (14 Stat. p. 107), and is also embodied in sec. 3, 186 of the Revised Statutes, and is as follows:

"And if any person, bank, association, company or corporation liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation." The question is as to the meaning of the words, "upon all property and rights of property belonging to such person, bank, association, company or corporation." Does this language apply to the property belonging to the Pacific Railroad when the taxes accrued, or only to that belonging to that company when the demand by which the lien was created was made? It was said by Mr. Justice Miller in *United States v. Pacific Railroad*, 4 Dillon, 71, that in construing this section it is proper to consider "the extraordinary nature of this lien." "It is," he said, "not only a lien upon the land, but it is a lien upon the personal property. It is not only a lien upon property in possession, but upon all rights to property depending upon contracts and upon unexecuted contracts. It not only creates a present lien, but it relates back." He further observes that the demand may be made long after the maturity of the tax, and will create a lien which relates back and establishes itself upon the property or rights of property of the defendant." The question in that case was as to the sufficiency of the demand, and the precise point now under discussion did not arise; but I think I am within the spirit of that opinion when I say that the statute should not be construed as subjecting property which has been conveyed to innocent purchasers prior to any demand, unless this is its plain meaning. The consequences of such a ruling would be so serious and far-reaching that I should not be willing to invoke them by any doubtful interpretation. There is no limitation as to the time within which the government may proceed against the persons who failed to comply with the income and other internal tax laws. I have no doubt such persons are numerous. Many of them may be insolvent now, but may have owned property when the taxes accrued, which has since passed through many hands. The law may well be liberally construed and rigidly enforced as against the guilty, especially where they have concealed their property or otherwise attempted to evade their just obligations to the government. But if upon making demand now at the end of twelve or fifteen years from the time when the taxes were due, the government can establish a lien upon all the property then owned by the delinquent tax-payers, it would result that in most cases, not the guilty, but the innocent

would be made to suffer. Such a doctrine would also unsettle the titles to real estate since it would be impossible to know or to ascertain whether the owner has not, during the existence of the income tax law, suppressed the truth as to his receipts and earnings, or made a false return thereof. In my opinion the language of the statute does not require the construction contended for by counsel for the government.

If Congress had intended to make the statute so far-reaching as to subject property in the hands of innocent purchasers, who became owners years before any step was taken by the government to assert its lien, this intention would have been plainly expressed. Such, however, is not the case. Let us examine the phraseology: "If any person * * * liable to pay a tax shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid * * * upon all property, belonging to such person." The statute does not say "upon all property which may have belonged to such person when the tax accrued." This or similar language would, I think, have been employed if Congress had intended to give the statute this effect. It must be conceded that the words "all property * * * belonging to such person" must be construed as referring to some time to be ascertained by the context, and, it may also be conceded, that we might without doing violence to the language of the law refer them to the time when the tax became due, and make the clause read "all property, belonging to such person, at the time the tax became due." This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, and may be phrased thus: "All property, belonging to such person at the time such demand is made." By this construction the lien, when it once attaches, relates back to the time when the tax was due, but does not attach to property transferred to innocent purchasers prior to demand. This view also harmonizes with the general policy of the law relating to land titles, which is to protect the citizen against loss from secret liens, not disclosed by any public record or ascertainable by due diligence. Nor is it unjust toward the government, for it is fair to presume that the government armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all powerful as it is to enforce its rights, will within reasonable time make demand or take some steps in the direction of making collections in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail, but if the opposite view is sustained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character.

Another ground of demurrer is as follows: "Because it appears that no assessment return

on list was ever made of said taxes, and so there can be no lien therefor."

The question whether an assessment by the assessor or other officer authorized by law to make it is a necessary step in the creation of a lien for taxes under the internal revenue laws is, so far as I know, undecided. These laws provided for assessors whose duties were very particularly prescribed. They were clothed with power to summon any person failing to deliver a list or return of taxes within the time required, or making a false return, as well as any other person, whether residing within or without the State, for the purpose of requiring testimony under oath respecting any object liable to tax, and disobedience to such summons was made punishable as a contempt of court. And in case any person or corporation failed to make a proper and true return, the assessor was required, from the best information he could obtain from an examination of witnesses and on his own view and information, to himself make a list or return of all such persons' taxes including special and income taxes. The assessor was authorized to hear and determine appeals concerning taxes returned in the annual list, and after disposing of these was to make out lists containing the sums payable according to law upon every subject of taxation for each collection district, which list was to contain the name of each person residing in said district liable to tax, and to furnish to the collectors of the several collection districts respectively copies of such lists. The collector was required to receipt for said lists and thereupon to give public notice that the taxes therein specified had become due and payable, and to fix a time and place within the county at which he or his deputy was to attend and receive the same. Then follows the provision already quoted providing that if any person, bank, association, company or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien, etc. I have given, without quoting at length, the substance of the provisions of the revenue laws applicable to the question now under consideration as they are found in the acts of June 30, 1864, [13 Stat. 223,] and of July 13, 1866 (14 Stat. 97). The question is whether these several steps in the preparation of the assessment lists and their return to the collector must precede the demand which is the foundation of the lien. The Supreme Court has decided in two cases that the obligation to pay the tax does not depend on an assessment made by an officer, but that the facts being established on which the tax rested, the law made the assessment and an action of debt could be maintained to recover it. *Dollar Savings Bk. v. United States*, 19 Wall. 227; *King v. United States*, 99 U. S. 229. The question in these cases was, however, simply as to the liability of the delinquent himself, when sued in an action of debt for taxes due and unpaid but never assessed by an officer. The present is a very different case; here the object is, not to enforce a common-law remedy in the collection of an admitted indebtedness, but to enforce a statutory lien against property which was once the

property of the debtor, but is now in the possession and ownership of others. It is well settled that in order to support and enforce a statutory lien for taxes all the prerequisites of the law granting the lien must be strictly complied with. *Thatcher v. Powell*, 6 Wheat. 119; *Parker v. Rule's lessee*, 9 Cranch, 64; *Ronkendorf v. Taylor*, 4 Pet. 394; *Stead Exrs. v. Course*, 4 Cranch, 403; *Early v. Doe*, 16 How. 618; *Williams v. Peyson's Lessee*, 4 Wheat. 77; *Mayhew v. Davis*, 4 McLean, 213-217; *Hilliard on Taxation*, p. 291; *Cooley on Taxation*, pp. 258, 259; 2 *Dillon on Mun. Corp.*, § 658.

The distinction between a suit to enforce a lien of this character and an action at common law to recover judgment for unpaid and past due taxes was clearly recognized and strongly stated by Mr. Justice Miller in his opinion in the former case in this court between the parties to this suit already cited [4 Dill. 71.] in which he said in referring to a suit to enforce such a lien: "All this is a very different thing from the collection of the taxes by the ordinary processes of distraint or by a suit against the party for the amount of them. In an action of debt no such demand is necessary for the collection as the Supreme Court of the United States has decided, because when the dividends are declared or the interest paid the law annexes to it the obligation to pay five per cent. on that amount. But the law does not annex to that any lien on a man's property. The law does not annex to those taxes as taxes, *ex propria vigore*, any lien."

In the same opinion he further said that in view of the extraordinary character of this statute and of the lien created thereby, "It is reasonable and it is proper that all the steps which the law requires of the party creating the lien in his own favor shall be pursued strictly."

Is then the assessment (in the case like the present where no return was made) one of the steps required by the law in the establishment of a lien? I am clearly of the opinion that it is. The regular order established by the statute is:

1. The return or the assessment by which the amount of the tax is fixed. 13 Stat., pp. 225 to 230, secs. 12 to 21 inclusive; 14 Stat., pp. 101 to 104.
2. The notice that the taxes are due and informing tax-payers of the time and place of payment. 13 Stat., page 232, sec. 28; 14 do., page 106.
3. The demand for the payment of the specific sum due from the individual tax-payer who may have neglected or refused to pay the same. 14 Statute, 107.

I do not feel at liberty to hold that any one of these steps is non-essential. A demand implies the previous ascertainment of a sum due, and this ascertainment is by means of the return or assessment.

The lien is not created by the law itself without any action by officers under the law, though a debt may be thus created. The liability of the taxpayer is one thing, the creation and enforcement of a lien, especially against innocent parties, is another and very different thing. What I have said is of course conclusive of the case, and the

other questions discussed by counsel need not be considered.

The demurrer is sustained.

TREAT, J., concurs.

NEGLIGENCE—INFANT—CONTRIBUTORY NEGLIGENCE OF PARENT.

SMITH v. HESTONVILLE ETC. R. CO.

Supreme Court of Pennsylvania, February, 1880.

Where in an action against a street railway company for damages for the death of plaintiff's child, alleged to have been caused by the negligence of defendant's servants, the plaintiff's evidence developed the fact that the child was only in his seventh year, and was accustomed to furnish spring water to the conductors and drivers upon the defendant's cars, in doing which the child had the plaintiff's permission and encouragement; and was thus engaged at the time of the accident causing its death: *Held*, that it was contributory negligence *per se* on the part of the plaintiff to suffer her child to engage in so dangerous an occupation, and that a nonsuit was properly entered.

Error to the Common Pleas No. 1, of Philadelphia County.

Case by Elizabeth J. Smith against the Hestonville, Mantua and Fairmount Passenger Railroad Company to recover damages for the death of her son, Willie, a lad seven years old, alleged to have been caused by negligence of defendants' servants. Plea, not guilty.

The evidence adduced on the trial by the plaintiff was as follows: Plaintiff was employed by the Pennsylvania Railroad Co. to clean cars, and was in the prosecution of her employment obliged to be absent from her home from seven in the morning until six in the afternoon. Her son, Willie, together with other boys in the neighborhood, was in the habit nearly every day during the summer of the year 1876 of getting water at a spring in the vicinity, and of then getting upon the platforms of street cars belonging to the defendant's company, and furnishing the drivers, conductors and passengers with water. For this service he had been accustomed to receive various small gratuities. He had never been warned by either drivers, conductors or policemen to discontinue this practice, or to keep off the car platforms. Plaintiff knew that her son was thus in the habit of going to the cars with water. The cup and pitcher used by him for this purpose was taken by him with her consent. She also cautioned him to be careful in getting on and off the cars. On the afternoon of August 7, 1876, plaintiff's son, in company with two other boys, somewhat older than himself, went to the corner of Thirty-third and Spring Garden streets for the purpose of serving water. They had sometimes done so in the same spot before. A car belonging to the defendant company came up a small hill upon Spring Garden street, advancing but slowly. Plaintiff's son jumped upon the front platform, which was not provided with a fender, and gave a drink to the driver. No one saw the accident which

ensued, or could explain the cause of it, but two or three minutes later, the car having continued moving in the interim, plaintiff's son was seen on the street between the front and hind wheels, lying upon his back, having been run over by the front wheel. He was soon after carried to the hospital, and in less than two days died from the effect of his injuries.

Defendant asked for a nonsuit on the ground of contributory negligence on the part of the plaintiff, in allowing the deceased boy to engage in the employment stated in the evidence at the age of seven years. The court (Allison, P. J.) granted the nonsuit, saying: "If the case went to the jury I should certainly say that it was contributory negligence on the part of the mother to send or permit her child, of seven years of age, to take upon himself the risks of a business of this kind; that is, that no child of seven years of age has discretion enough to be trusted under such circumstances with its own protection, and going with the permission is equivalent to going with the direction of the parent. The parent knew it, furnished it with her own pitcher in which to carry the water, sent it, and sent it even with a caution to be careful, but sent it with these risks upon itself. I cannot, as at present impressed, regard under any circumstances the fact that a parent takes upon herself to permit or to direct her child to go and carry on such a business as that, otherwise than that it is *per se* negligence, on the part of the parent, to subject a child of seven years of age to all the risks incident to such a business."

The court in banc subsequently refused to take off the nonsuit. The plaintiff thereupon took this writ, assigning for error this action of the court.

A. Sydney Biddle, for plaintiff in error.

The corporation defendant was negligent in that it allowed so young a child to ride upon the platform; it furnished no fender upon the front platform; it did not stop the car to allow plaintiff's son to get off. *Fairmount etc. R. Co. v. Stutler*, 54 Pa. St. 375; *P. A. & M. R. Co. v. Caldwell*, 74 Pa. St. 421; *Crissey v. H. M. & F. R. Co.*, 75 Pa. St., 83; *Phila. City R. Co. v. Hassard*, 75 Pa. St., 367; *R. R. Co. v. Gray*, 3 W. N. 421; *Colgan v. W. P. R. Co.*, 4 Id. 401; *Kay v. Penn. R. Co.*, 65 Pa. St. 276.

There was no proof of any contributory negligence on the part of plaintiff's son, and at any rate his age was such as to prevent contributory negligence being imputed to him. *Rauch v. Lloyd*, 31 Pa. St. 358; *Johnson v. W. C. & P. R. Co.*, 70 Pa. St. 357.

Nor was there contributory negligence on the part of the plaintiff. True, she knew her son was in the habit of carrying water on the cars, but there was no evidence that she knew how he did it. Nor could she reasonably have foreseen and provided against the occurrence of a set of circumstances which, without the defendant's gross carelessness, could not have resulted in injury to the child. *Penn. R. Co. v. Ogier*, 33 Pa. St. 72; *Gray v. Scott*, 65 Pa. St. 345.

The mere permission of the mother to the son to furnish water was not a sufficiently proximate

cause of an accident caused wholly by defendant's negligence, to debar her from recovery. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Cosgrove v. Ogden*, 49 N. Y. 255; *Ihl v. Forty-Second street, etc.*, Co. 47 N. Y. 317; *Pa. R. Co. v. Lewis*, 79 Pa. St. 33.

The act of April 26, 1855 (P. L. 309), is a supplement to that of April 15, 1851, § 18 (P. L. 674). The intention of the former act was to substitute the personal representatives of the deceased for him. Hence the only contributory negligence involved is that of the deceased, not that of the plaintiff.

Samuel Gustine Thompson, for defendant in error.

There was no sufficient evidence of negligence on the part of defendant to go to a jury. Such negligence must be proved by plaintiff, otherwise a nonsuit is rightly entered. *Clark v. R. Co.*, 5, W. N. 119; *Heil v. R. Co.*, Id. 93; *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. 314.

The plaintiff was guilty of contributory negligence in allowing a child of such tender years to engage in such a dangerous employment. *Kay v. Pa. R. Co.*, 65 Pa. St. 276; *R. R. Co. v. Hummell*, 44 Pa. St. 376; *P. & R. R. Co. v. Long*, 75 Pa. St. 257; *Glassey v. Hestonville, etc.*, R. Co., 57 Pa. St. 172; *Smith v. O'Connor*, 48 Pa. St. 223; *P. A. & M. R. Co. v. Pearson*, 72 Pa. St. 33.

TRUNKY J. delivered the opinion of the court: Previous to the accident which caused the death of the plaintiff's son, he and older boys had been in the habit of supplying the drivers and conductors with water to drink, who encouraged them to do this by giving them pennies. At the time the plaintiff's child was at the defendant's cars for that purpose, the plaintiff not only had knowledge of this habit, which began before the summer vacation of the public school, and was continued in the vacation, but she permitted it. She saw the money her child made, furnished him with cup and pitcher, and cautioned him to be careful in getting on and off the cars.

The child was not seven years of age. He was incapable of negligence, and could not use the care required of a mature person under like circumstances. His business was with the defendant's employees—to give them water and receive a reward. This is not the case of a child having occasion to cross the track in going to school or for other purpose; nor of one that had wandered into the street without the parent's knowledge; nor even of one permitted to play on the street. If it be that the plaintiff's testimony warrants an inference of negligence by the defendants, because their drivers and conductors encouraged this child, with others, to furnish them water, the admitted fact that the child's act was with the plaintiff's permission, authorized the judgment of nonsuit, for the reason given by the learned judge of the common pleas.

The argument of counsel certainly is ingenious in support of his proposition that "the negligence of the statutory plaintiff, arising from knowledge or direct act, can not preclude recovery where there has been no contributory negligence on the

part of deceased." However, this is not an open question. In *Smith v. O'Connor*, 48 Pa. St. 218, it was held that it is not unjust to require a defendant to answer for the mischief done by his wrongful conduct in favor of one who was not in concurrent fault, and that an infant seven years old could not be in such fault. This was in reference to an action by the infant himself; and respecting an action by a father for an injury to his infant son, Strong, J., said: "In such a case it may be that the father should be treated as a concurrent wrongdoer. The evidence may reveal him such. His own fault may have contributed as much to the injury of the child, and consequently to the loss of services due him, as did the fault of the defendant. He owes to the child protection. It is his duty to shield it from danger, and his duty is the greater the more helpless and indiscreet the child is. If by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be *in pari delicto* with a negligent defendant." These remarks were pertinent to the point decided in *Glassey v. Railroad Co.* 57 Pa. St. 172, that a father can not recover for an injury to his infant son, which was partly caused by his own imprudent act in failure to perform his paternal duty, and it makes no difference whether the injury of which he complains was to his absolute or relative rights. Referring to that case the present chief justice said it very properly settled "that if the parents permit a child of tender years to run at large without a protector in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such the negligence is a conclusion of law, and ought not to be submitted to the determination of the jury." *Railway Company v. Pearson*, 72 Pa. St. 169. The principle was repeated in *Railway Company v. Long*, 75 Pa. St. 257, when it was said: "To suffer a child to wander on the street has the sense of permit. If such permission or sufferance exist it is negligence."

Most frequently in trials the question whether there was reasonable care on the part of the parent is a fact for the jury; but where the testimony of the plaintiff directly shows his contributory negligence it is the duty of the court to pronounce the law.

Judgment affirmed.

NOTE.—The decision in the foregoing case is unquestionably correct. There is a class of cases which may for a moment cause some perplexity when considered in connection with it, but there is a radical distinction between them and this. Thus, to state the facts of a frequently cited case, in *Wilton v. Middlesex R. Co.*, 107 Mass. 158, the plaintiff, a girl nine years of age, was walking with several other girls upon a bridge when one of the defendant's street cars came along very slowly, and the driver beckoned the girls to get on, which they did. At this moment the driver struck the horses and they started into a fast trot. The plaintiff had but one foot on the step, and

by reason of the sudden start lost her balance, and although she called to the driver to stop, the car was not stopped and she fell under one of the wheels, which passed over her arm, injuring it in such a manner as to render amputation necessary. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority was to be implied by the fact of his employment by the defendants as driver. Upon these facts Morton, J., said: "The driver of a horse car is an agent of the corporation, having charge in part of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions. It follows that the plaintiff being lawfully upon the car, though she was a passenger without hire, is entitled to recover if she proves that she was using due care at the time of the injury, and that she was injured by the negligence of the driver." These views were reiterated by the same court in a subsequent action by the father of the plaintiff for loss of services resulting from this injury. *Wilton v. Middlesex R. Co.*, 125 Mass. 130. In *Pittsburgh, etc. R. Co. v. Caldwell*, 74 Pa. St. 421, two stray children, aged respectively five and eleven years, were permitted by the driver of a street car to ride gratuitously upon the front platform until the younger was in some manner thrown off and had one of her legs crippled. Williams, J., said: "If the rules of the company had not forbidden it there can be no doubt that it was gross negligence for the driver to allow children as young as the plaintiff and her companion to get on the front platform and to ride there. If they got on without his permission, instead of consenting that they might remain on the platform, it was his duty to compel them to go inside the car or to stop and put them off; and if the plaintiff was injured by his negligence in allowing them to ride on the platform, the company is clearly liable for the injury, unless the plaintiffs negligence contributed to produce it." *Day v. Brooklyn City R. Co.*, 12 Hun, 435, as well as the principal case, forcibly illustrates the Jehu's fondness for the natural beverage. As the plaintiff, a boy fourteen years old, was walking in the street with a can of water, a driver of the defendants' cars called to him to give him a drink. The horses being at the time on a walk, the plaintiff stepped on the front platform, gave the can to the driver who drank therefrom, and returned it to the plaintiff, telling him to hurry off quick. The plaintiff asked him to stop the car, but he paid no attention to him, and as the plaintiff was stepping off whipped the horses into a trot, in consequence of which the plaintiff's foot becoming entangled in the step he was thrown under the car wheels and injured.

In each of the foregoing cases it will be noticed that the children were riding gratuitously at the invitation or by the permission of the driver of the car, as in the principal case. Such conduct on the part of this servant was undoubtedly reprehensible negligence, as indicated by the foregoing language of Williams, J. The rule is universal that care and caution can be demanded of a child according to his maturity and capacity only. *Lynch v. Nurdin*, 1 Q. B. 29; *Railroad Co. v. Stout*, 17 Wall. 657. In the case of the child whose death was the subject of this suit, little or no discretion could be expected to be exercised by him. *North Pennsylvania R. Co. v. Mahoney*, 57

Pa. St. 187; *Kay v. Pennsylvania R. Co.*, 75 Pa. St. 269; *Margam v. Brooklyn R. Co.*, 38 N. Y. 455; *O'Mara v. Hudson, etc. R. Co.*, 38 N. Y. 445; *Daley v. Norwich, etc. R. Co.*, 26 Conn. 591; *Chicago, etc. R. Co. v. Gregory*, 58 Ill. 228; *Schmidt v. Milwaukee, etc. R. Co.*, 23 Wis. 186; *Walters v. Chicago, etc. R. Co.*, 41 Iowa, 71; *Norfolk, etc. R. Co., v. Ormsby*, 27 Gratt. 455; *Govt. St. R. Co. v. Hanlon*, 53 Ala. 70; *Frick v. St. Louis, etc. R. Co.*, 6 Cent. L. J. 317. A recovery would therefore have been permitted had this child been maimed instead of killed, and he, the plaintiff in the case instead of his parent. This is so, because the rule of "imputed negligence" which visits upon a child too young to be safely permitted to go at large, the consequences of its parents negligence in suffering it to run into dangerous places has never been countenanced in Pennsylvania. *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358; *Smith v. O'Connor*, 48 Pa. St. 218; *Glassey v. Hestonville, etc. R. Co.*, 57 Pa. St. 172; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Philadelphia, etc. R. Co. v. Long*, 75 Pa. St. 257. In this respect the action would have been the same as that in each of the three cases, the facts of which have been stated in the foregoing, trespass for personal injuries. But supposing this child had survived this injury, and to have been of an age to warrant an additional action by the parent for the loss of its services, could such an action have been maintained? Manifestly not, because the plaintiff in such action has contributed to the occurrence of the accident for which redress is sought. In *Bellfontaine, etc. R. Co. v. Snyder*, 18 Ohio St. 399, a child recovered damages for an injury, the result of the concurrent negligence of the defendant's servants, and the person having it in charge. In a subsequent action by the father of the child for the loss of its services by reason of this injury, the negligence of the child's custodian was held to be the negligence of this plaintiff, preventing a recovery. *Bellefontaine, etc. R. Co. v. Snyder*, 24 Ohio St. 670. Such being the law, it would seem that the court very properly refused to recognize any distinction between *Elizabeth J. Smith*, mother of the child killed, whose reckless disregard for its safety was instrumental in causing its death, and *Elizabeth J. Smith*, personal representative of the unfortunate lad, to whom the fruits of this action would have accrued in case a recovery of damages had been permitted. See *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; s. c., 37 Pa. St. 420; *Birmingham v. Dorer*, 3 Brewst. 69; *Isabel v. Hannibal, etc. R. Co.*, 60 Mo. 475; *Walters v. Chicago, etc. R. Co.*, 41 Iowa, 71; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Koons v. St. Louis, etc. R. Co.*, 65 Mo. 592; *Daley v. Norwich, etc. R. Co.*, 26 Conn. 591, 598; *Baltimore, etc., R. Co. v. State*, 30 Md. 47.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES CIRCUIT AND DISTRICT COURTS.

JOINDER OF ACTION AGAINST ADMINISTRATOR AND SURETIES—TEMPORARY ADMINISTRATOR. In equity.—MCCRARY, J. (full opinion): "This case was submitted upon a demurrer to the complainant's bill. The bill is brought by the heirs of Mrs. Roberts against her administrator and his sureties, charging

fraud in the settlement of the accounts of the estate, and seeking to have a settlement of the amount due from the administrator and to recover the same as against him and his sureties. The demurrer raises the question whether the two can be joined in one action; that is a suit against the administrator to settle his accounts and to recover the balance, and at the same time against his sureties to obtain judgment against them for whatever balance may be ascertained. That question has been fully settled by a case which went up from this court and was twice considered by the Supreme Court of the United States—*Payne v. Hook*, 7 Wall. 425, 14 Wall. 252—where the same question was fully considered; and the right to join the administrator and his sureties in such a suit for such purposes, sustained. The further question is made, which is this. The administrator of this estate presented a claim in his own behalf, and for the purposes of the allowance of that claim, a temporary administrator was appointed—called under the statute, I believe, an attorney—to represent the estate. There was a hearing upon that matter and the claim was allowed. It is now insisted that the sureties of the administrator are not responsible for any fraud committed in that transaction. The bill, however, charges collusion and fraud on the part of the administrator in connection with this transaction, and it will depend, I think, altogether on the proof as to whether he is liable; and if liable, of course his sureties are liable. That matter can be determined only after the proofs are submitted. The demurrer to the bill is overruled.”—*Donohoe v. Roberts*. United States Circuit Court, Eastern District of Missouri. March 13, 1880.

SUPREME COURT OF KANSAS.

February Term, 1880.

CORPORATION—EVIDENCE.—On the trial of a criminal case, the existence of a railroad corporation may be proved by general reputation. A *de facto* existence of a corporation is all that is necessary to be shown. Affirmed. Opinion by HORTON, C. J. All the justices concurring.—*State v. Thompson*.

COUNTY ATTORNEY—FEES—IMPLIED CONTRACT.—Where a county attorney goes beyond the limits of his county to do business for his county, at the instance and with the consent of the county board, he may recover reasonable compensation for such services in addition to his salary, although there is no express contract between the attorney and the board that he shall receive compensation therefor. The law implies a contract. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Huffman v. Commrs. of Greenwood Co.*

MALICIOUS PROSECUTION—CONTINUANCE—ABSENT WITNESS.—In an action for a malicious prosecution, where the defendant admitted in his answer substantially the whole of the plaintiff's case, except that he alleged that the prosecution, supposed to be malicious, was commenced by the defendant by the advice of counsel and was with probable cause, and not malicious, and on the day of the trial the defendant, with the permission of the court, struck out of his answer all these admissions leaving as his answer nothing except a general denial, which puts in issue all the allegations of the plaintiff's petition; and the parties then went to trial, the plaintiff relying upon the attendance of a witness who was near where the trial was had, the trial being held in Atchison city and the witness being just across the river in

the State of Missouri; and this witness had previously but irregularly been subpoenaed in Missouri to attend said trial, and had also promised to do so; and he again, during the progress of the trial, promised to attend but did not in fact attend; and when it was ascertained that he would not attend, the plaintiff made an application for a continuance on account of the absence of said witness, and the plaintiff filed an affidavit setting up the foregoing facts and other necessary facts and what he expected to prove by the witness, and the court overruled said application for a continuance. *Held*, error. That ordinarily a party is not justified in relying upon a service of a subpoena made outside of the State, when the subpoena was issued in the State, or upon the mere promise of a witness to attend the trial, but under the circumstances of this case, where the issues upon which the trial was had were made up on the day of the trial (the issues being changed from what they had previously been, against the wishes of the plaintiff), the plaintiff might very properly rely upon such a service and such a promise. Reversed. Opinion by VALENTINE, J. HORTON, C. J., and BREWER, J., concurring specially.—*Krauer v. Morrow*.

SUPREME COURT OF INDIANA.

March, 1880.

PROMISSORY NOTE—ALTERATION—IMPLIED AUTHORITY.—This was an action on a promissory note. The note was in the usual form of commercial paper negotiable by the law merchant, except when executed the place where payable was left blank. Afterwards the payee asked the maker where he should leave the note for collection, and the latter replied: “At the First National Bank at Spencer.” Subsequently the payee, without the knowledge of the maker, inserted the name of the bank named in the blank space in the note. *Held*, that the note upon its face imports that it was intended to be made negotiable, else the waiver of protest and notice would not have been inserted, and that the payee had implied authority from the conditions of the note and the statement of the maker, to fill up the blank as he did; that the note was valid in the hands of the payee, and being so, was valid in the hands of an indorsee, whether he had notice of the alteration or not. Affirmed. Opinion by BIDDLE, J.—*Marshall v. Dresher*.

STATUTE OF FRAUDS—PART PAYMENT—PROMISSORY NOTE.—A complaint on a parol contract, within the seventh section of the statute of frauds, which does not show that the purchaser has received part of the property, or given something in earnest to bind the bargain, or in part payment, does not state facts sufficient to constitute a cause of action and a demurrer thereto for want of sufficient facts ought to be sustained. 2 Page, 177; *Harper v. Miller*, 27 Ind. 277, overruled. And a promissory note given by the purchaser in part payment for the property can not be regarded as part payment within the meaning of the statute. *Held*, however, that had the note been shown by the complaint to have been governed by the law merchant, the question might have been different. Whether an express agreement between the parties that the note should operate as a payment of the debt would have been sufficient to take the case out of the statute, *quære*. “Earnest,” must have some value. The note was of no value because it had no consideration to support it. The contract not being valid, the note given in discharge of it was based upon no valid

consideration. 10 Barb. 573; 26 Wis. 511; 28 Mich. 418. If the promise of one is not valid and binding because not made in accordance with law, it can furnish no valid consideration for the promise of the other. The element of mutuality is entirely lacking in such cases. Reversed. Opinion by WORDEN, J.—*Krohn v. Bants*.

CONSTITUTIONAL LAW—TAXATION — EXEMPTION OF WIDOWS' PROPERTY — "CHARITABLE PURPOSES."—This was an application by a widow to have refunded to her certain taxes which she had paid on property exempted by law from taxation. The statute provides that the following property shall be exempt from taxation: "The property to the amount of \$500 of a widow or unmarried female, or any female minor whose father is deceased, if her whole estate, real and personal, not otherwise exempted from taxation, does not exceed in value the sum of \$1,000." BIDDLE, J., said: The Constitution declares that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just value for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be specially exempted by law." If the exemption from taxation provided for in the class above cited can be upheld, it must be under the head of "charitable purposes." A charity or charitable purpose or use, means in law a public charity, use or purpose, which affects the public alike, without reference to an individual, class or any particular domestic relation. A private charity dispensed by an individual out of his own means, the law will not restrain; but a private charity dispensed by the State at the expense of her citizens can not be upheld. It must be public, benefitting all alike, without reference to individuals or classes as such. It is the character of the property, its use or purpose, and not the character or class of its owner, that may exempt it from taxation. To exempt by law private property owned by a private person and used for a private purpose on account of the sex or domestic relation of the owner, is a violation of the constitutional principle that taxation shall be uniform and equal on all property, both real and personal. Cooley on Tax., 124, 153, 174; 20 Cal. 534; 38 Ind. 3; 18 Md. 1; 32 N. J. 426, 25 Ill. 458; 34 Tenn. 305. It must be held that the clause of the statute above cited is unconstitutional and void. Judgment affirmed.—*State v. City of Indianapolis*.

general principle governing the responsibility of the master for the acts of his servant applied. The defendant engages in the business of selling liquor voluntarily. He chooses to entrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment. Opinion by SOULE, J.—*George v. Gobey*.

FIRE INSURANCE—OWNERSHIP — MORTGAGE AND LEASE.—An insurance policy required that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or if the building insured stands upon leased ground, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void." When the policy was applied for and issued, the buildings insured were subject to three mortgages, and also to a lease for five years, and after the fire the equity of redemption in the land with the portions of the insured buildings remaining thereon were sold by auction. The plaintiffs, the assignees of one Day, offered to prove that Day, at the time of applying for the insurance, communicated these mortgages and the lease to John H. Derby, who had an office as an insurance agent in the neighboring city of Salem, and who solicited Day to take this insurance, and who was the only person with whom Day immediately dealt, and from whom he received the policy, and to whom he paid the premium. But this evidence was excluded and it was ruled that the interest of the assured was not sufficiently represented to the company and expressed in the policy, and the policy was therefore void. Held, that the foregoing provision being in the body of the policy and inserted for the benefit of the defendant, was to be construed strictly against it and liberally in behalf of the plaintiffs; that as between the assured and the defendant the mortgages and the lease were mere incumbrances on his title not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership; and that the above ruling was erroneous. Insurance Co. v. Haven, 95 U. S. 242; Taylor v. Etna Ins. Co., 120 Mass. 254; Manhattan Ins. Co. v. Barker, 7 Helsk. 503. Opinion by SOULE, J.—*Dolliver v. St. Joseph Fire and Marine Ins. Co.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1880.

"CIVIL DAMAGE" LAW—SALE OF LIQUOR—DAMAGES—MASTER AND SERVANT.—In an action of tort brought under statutes of 1875, ch. 99, § 16, which gives a right of action to the husband, wife, parent, child, guardian or employer of any person in the habit of drinking spirituous or intoxicating liquor to excess against a person who, after notice in writing requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit, at any time within twelve months after being so notified, sells or delivers any such liquor to the person having such habit, it appeared that the sales complained of were made by the defendant's barkeeper contrary to the defendant's instructions to him: Held, that the

WILL—"CASE" CONSTRUED "CAUSE"—CHARITABLE TRUST—TRUSTEE.—1. A testator gave two-fifths of the residue of his estate to the children of his son G, "and the remainder one-half to the missionary case of M. E. Church, the other half to," etc. Held, that the word "case," in the absence of evidence of any use of the term in the sense of "box," might be taken to be a misspelling of the word "cause," as many clerical errors appeared in the will; and that this impression would be strengthened by the fact which appears in the report, that in the church of which the testator was a member, money collected for missions was frequently spoken of as collected for the missionary cause; that so interpreted the object for which it was given was of such character and described with sufficient definiteness to make a valid devise for charitable purposes. Jackson v. Phillips, 14 Allen, 539. 2. The Missionary Society of the Methodist Episcopal Church, a corporation organized under the laws of the State of New York,

made petition, as the devisee, for partition of the above-described estate. It appeared that, by the rules of the Methodist Episcopal Church, all money collected for missions, was required to be sent to the petitioner, and that there was no incorporate society, nor organization of any kind, in New England which took charge of the missionary work of the denomination, although the rules of the denomination provided for the establishment of such societies, in certain contingencies, in the several conferences. It did not appear that the testator knew of the name of the petitioner, nor of its existence, though he knew that the money collected in the church of which he was a member was sent to and managed and expended by an organization acting in the interest of the Methodist Episcopal Church, in the city of New York. *Held*, that the petitioner did not take as devise; and that the questions who is to manage the trust, and whether the charitable purposes of the testator shall be effected through the instrumentality of the petitioner, can be settled only in proceedings on the equity side of the court. *Bartlett v. Nye*, 4 Met. 378; *Washburn v. Sewall*, 9 Met. 280; *First Universalist Society v. Fitch*, 8 Gray, 421; *Winslow v. Cummings*, 3 Cush. 358; *Brown v. Kelsey*, 2 Cush. 243. Opinion by SOULE, J. — *Missionary Society of the Methodist Episcopal Church v. Chapman*.

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, Jan., 1880.]

ISSUE OF BONDS TO BUILD SCHOOL HOUSES — WANT OF POWER—DEFECTIVE ELECTION.—Appeal from judgment against lands of appellant for school taxes claimed to have been levied by district No. 1, township No. 39, range No. 12. Appellant appeared in the county court and objected to the giving of judgment against his lands for school taxes. The only basis of the levy of part of this tax viz. for building purposes, was a vote at a special election held on the 13th day of October, 1877, purporting to authorize the issuing of bonds for such purposes; the notices of such election did not contain any statement or information that the question of issuing bonds for building a school house, or for any purpose, would be voted on at such election, nor had the question of issuing bonds or building a school house been voted on at any election. SCHOLFIELD, J., says: "By sec. 47, ch. 122 (R. S. 1874, p. 962) it is provided that for the purpose of building school houses, etc. etc., the directors by a vote of the people at an election, called and conducted as required in the forty-second section of this act . . . may borrow money, issue bonds, etc., etc. The forty-second section requires that notices of election shall be given, etc., and the notices shall specify the question or questions to be voted on. It was held in 76 Ill. 189, that under sec. 48 of the school law of 1865 (which so far as the question before us now is concerned, was in no essential respects different from the Revised Statutes of 1874), it was unlawful for school directors to build a school house without a vote of the people of the district on the question, and if they did so their act would be null and void . . . every tax levied for the payment of the same would be void. Practically, the pretended election here was without any notice, for the voters of the district were justified in assuming, inasmuch as there was no question in regard to building school houses specified in the notice published, that no vote would be taken

on such question. It is fair to assume that many remained away who would have been present and voted, had they been notified an election would be had on these questions. The want of notice goes to the existence of the power (and not merely its defective execution) to issue the bonds. See 88 Ill. 11; 64 Ill. 249; 64 Ill. 427; 65 Ill. 263; 68 Ill. 160; 67 Ill. 57; 67 Ill. 65; 78 Ill. 474. Hence the levy for their payment is illegal." *Reversed*.—*Thacher v. People*.

[Filed at Springfield, Feb. 1880.]

MECHANIC'S LIEN—BOND FOR DEED—PREVIOUS INCUMBRANCES.—One H, the owner or certain land and the plaintiff in error herein, contracted with P for its sale at the price of \$200 on a credit of three years, with interest payable semi-annually. The first installment had been paid when G built a house upon the land. While this was in completion, an arrangement was made between H and P that the former was to advance him \$230 and the latter then gave him a bond to convey the land to him on the payment of \$430 in a certain period. By sec. 17 of ch. 82 of the Rev. Stats. it is provided that no incumbrance upon the land created before or after the making of the building contract shall operate upon the building until the lien in favor of the mechanic shall have been satisfied, and in such case the previous incumbrance shall be preferred to the extent of the value of the land at the time of making the building contract. *Held*, (1) that the interest of H under the first contract was not a "previous incumbrance" within the meaning of this statute, but *aliter* as to the second contract. When a vendor of land who gives a bond for a deed to be made on payment of the purchase money, after the purchaser has contracted for the erection of a building upon the premises, loans the purchaser money and gives a new bond for a deed to be made upon the payment of the original price and the sum thus loaned, the vendor as to the mechanic who erects the building will in equity occupy the position of a subsequent incumbrancer as to the sum loaned, and be postponed to the rights of the mechanic, but not as to the purchase money due under the original contract of sale. The statute gives a lien by virtue of a contract "with the owner" of the land (ch. 82, § 1, Rev. Stats. 1874). The second section extends the lien to any other interest which such owner may have in the land at the time of the contract. The contract in this case was not made with H the owner of the fee, but with P who was the owner of a contingent interest in the lot depending upon his compliance with his contract of purchase with H. The lien then was not upon the fee which H held, but upon the interest of P whatever that was under his contract with H. P could not by any act of his impair the title of H or give to G any better title or greater interest in the land than he himself held. 2. The decree should declare the relative rights of the several parties as here indicated, and in default of payment by P, a sale of P's interest in the land should be ordered; that is the land should be sold subject to H's right as vendor, and from the proceeds the mechanic should be first paid the amount of his lien, and from the balance, if sufficient, the first demand of H for the money lent and accrued interest should be paid and the remainder, if any, after paying these demands and costs, should be paid to P. *Reversed* and remanded. Opinion by DICKEY, J.—*Hickox v. Greenwood*.

CURRENT TOPICS.

If the shades of the old judges are ever allowed to hover around the courts, that of Eldon must have been sorely vexed when the Supreme Court of Pennsylvania on the first day of last month decided the great will case of *Manner's Appeal*, 37 Leg. Int. In that case the testator had by his will provided for the endowment of a public library; and a bill had been filed by the heirs contesting the will. Among the clauses directing how the library was to be regulated was the following direction: "I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency." The plaintiffs contended that as no work was to be excluded on these grounds from said library, works must be admitted to its shelves which inculcate rebellion, treason, atheism, deism, materialism or which uphold polygamy and socialism, and which contain the numerous arguments now in existence, or which may hereafter be framed against religion, and against sound morals and the good order and well-being of society, and that therefore a trust for the propagation of such sentiments could not be sustained. The court held that the devise to the library being for a lawful purpose, and having vested, and the primary intent of the testator being to assist what the Supreme Court, in *Donohugh v. Library Co.*, 35 Leg. Int. 104, has declared to be a "purely public charity," the intention of the testator could not be defeated and the trust set aside because one of the directions or conditions of the bequest as to a secondary intent may happen to be illegal. The doctrine of *cy pres* is part of the law of Pennsylvania to the extent that it will strike down the unlawful direction and leave the primary intent untouched. But regarding the proposition that no trust can be sustained for the protection of immorality or infidelity, the court said: "No fault is found with this statement of the law. It may be regarded as settled in Pennsylvania that a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality, or hostility to the existing form of government. A man may do many things while living which the law will not do for him after he is dead. He may deny the existence of a God, and employ his fortune in the dissemination of infidel views, but should he leave his fortune in trust for such purposes, the law will strike down the trust as *contra bonos mores*. We need not elaborate this question nor extend the illustrations. The whole subject is thoroughly discussed in a number of cases, which fully sustain the principle above stated. See *Updegraph v. Com.*, 11 S. & R. 394; *Vidal v. Girard's Executors*, 2 How. 127; *Zeisweisser v. James*, 13 P. F. S. 465. In the case last cited, the testator devised all his property to his grand-nieces for their lives and the life of the survivor, remainder to 'The Infidel Society in Philadelphia, hereafter to be incorporated, for the purpose of building a hall for the free discussion of religion, politics, etc.,' and this court said, referring to the trust for the infidel society: 'It is plain that no court would ever undertake to administer such a charity.'"

In sustaining the will in the principal case, Paxson J. made the following remarks: "We must examine this clause of the will from the testator's standpoint, so far as this is possible, in order to ascertain his meaning in the paragraph in question. He was an ed-

ucated man of scholarly habits, and of no mean scientific attainments. The ample fortune which he enjoyed gave him the opportunities of indulging his tastes fully. He says in his will, 'my property has enabled me to devote, happily and undisturbed, the latter part of my life to pursuits of scientific inquiry, which I have deemed to be more beneficial than the more common enjoyment of an ample fortune.' In his researches in the paths of science, even in the line of his own profession, it is not unlikely he fully realized that the conventional opinions of yesterday may not be those of to-day, and are not likely to be those of to-morrow. He possibly remembered that, when he commenced the practice of medicine, a patient burning up with fever was not allowed a breath of fresh air or a drink of cold water; that bleeding was resorted to in almost every disease; that the introduction of anesthetics was by some regarded as impious and unscriptural, and an attempt on the part of females to defy the primeval curse; that before his day Harvey's theory of the circulation of the blood was treated with derision, and cost that eminent physician a large portion of his practice, and that Jenner's discovery of vaccination was denounced by his own profession as empirical, and by the clergy as wicked. And outside of his own profession, in science, government, theology and morals, he would have seen substantially the same thing—one discovery treading quickly upon the heels of another; one conventional opinion after another giving way before the spread of learning and the advance of science. From his own experience in his various researches, the testator probably realized the importance and value to educated men of a public library which should place within their reach such books as are not readily accessible. With a desire to promote temperate, sincere and intelligent inquiry and discussion, he imposes no restriction upon the character of the books, except that they shall not contain either ribaldry or indecency. He would make his library a place where the student whether of science, government or theology, could find the information for which he longed. His recommendation in regard to books was negative merely. Beyond his own writings, which will be noticed hereafter, he directed no book to be placed upon the shelves. This is as true in regard to theology as to any of the other subjects mentioned. It can hardly be said that the interests of Christianity and sound morality require that the student of theology shall be debarred access to all books that may be regarded as objectionable from an orthodox standpoint. He is best armed to defend Christianity who is familiar with the arguments against it. To enforce such a rule would exclude from this library a vast amount of the choice literature of the past, the works of authors who merely wrote according to the light of their day and generation. We may now safely enjoy all that is good of their writings. The world has outgrown their errors."

NOTES OF CASES.

In *Manufacturers Bank v. Dickson*, decided by the Supreme Court of New Jersey in November last, an action was brought against the sureties on a bond conditioned that the principal should faithfully perform the duties of assistant cashier in a bank. From the date of the bond and for a year thereafter he was employed as assistant clerk, his duties being principally those of messenger. He was then promoted to a

higher clerkship with a higher salary. Afterwards he was further promoted to the position of bookkeeper and while in this post embezzled certain sums of money from the bank. After his second promotion the sureties had no notice of the change made by the bank in his position and duties. The court held that the defendants were not liable for any want of faithfulness on the part of the bookkeeper after his second promotion; and that when he was promoted to the position of bookkeeper he ceased to be an assistant clerk within the meaning of the bond. That a surety is not to be held beyond the precise terms of his contract is declared by Kent, J., in *Ludlow v. Simond*, 2 Cal. Cas. 1, to be a well-settled rule, both at law and in equity, and to be founded on the most cogent and salutary principles of public policy and justice. *McMicken v. Webb*, 6 How. 292; *Bowmaker v. Moore*, 7 Price, 223; *Smith v. United States*, 2 Wall. 219; *McCluskey v. Cromwell*, 11 N. Y. 593. In *Pybus v. Gibb*, 6 Ell. & Bl. 902, a bond was executed by G and two sureties, conditioned for indemnifying the high bailiff of a county court against liabilities for the misconduct in office of G, who was appointed by the high bailiff to act under him as a bailiff of said court. At the time the bond was executed, the jurisdiction of the county court was regulated by statute 9 and 10 Vict. After the execution of the bond, the jurisdiction of that court was extended and increased by several statutes. It was held that these statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G was in respect of a matter within the jurisdiction conferred by the statute first named, and as to which the duty of the bailiff was not altered by the later acts. Campbell, C. J., said: "It may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided, * * * the question is whether the nature and functions of the office or employment are changed; for if they are, it is not the same office within the meaning of the bond." Coleridge, J., said: The rights and liabilities of sureties have often been considered in England, and many points are well established. One is that when the nature of the employment of the principal is so altered by the act either of his employer or of the legislature that the risk of his surety is materially altered, the surety has a right to say, 'I did not bargain for this risk; I am discharged.' "

The Supreme Court of New Hampshire in the recent case of *Everett v. Warren Bank*, ruled that the remedy of a party against whom a judgment has been recovered without notice, upon the unauthorized appearance in his behalf of a regular attorney of pecuniary responsibility, is by proceeding against the attorney for redress for any damages he may have suffered; and equity will not restrain the enforcement of such judgment by injunction, following *Banton v. Lyford*, 37 N. H. 512, and *Smyth v. Balch*, 40 N. H. 363. In affirming these cases the court said: "We are not unmindful of the fact that the weight of authority in the American courts at the present time seems to be against the doctrine of those cases. The rule is not in harmony with the general law of agency, for the reason that the legal presumption as to the

authority of an attorney differs from that of other agents. The appearance of a regular, responsible attorney of the court is presumed to be authorized by the party for whom he appears, and if his authority is questioned, his own declaration is ordinarily sufficient proof of his authority. *Bank v. Fellows*, 28 N. H. 302. Therefore, the opposite party is guilty of no negligence in relying upon the appearance of the attorney as authorized, and is entitled to reasonable protection against such damages as he might suffer, if the appearance, which the law presumes to be by authority, was held void. On the other hand, the party for whom the unauthorized appearance is made is also entitled to reasonable protection. To hold the unauthorized appearance void in all cases would not give reasonable protection to the party against whom the appearance is made. To hold it valid in all cases would not give reasonable protection to the party for whom it is made. If it is held void, the attorney would be liable to the party against whom he appeared. If it is held valid, he would be liable to the party for whom he assumed to appear. Why should one party, rather than the other, be compelled to seek his remedy against the attorney? It may be suggested whether there is not greater danger of injustice being done by parties falsely denying the authority of attorneys to appear for them, than is to be apprehended from unauthorized appearances by attorneys; and, if the danger of a false denial of authority is vastly greater than the danger of an unauthorized appearance, whether justice and sound policy do not require that when the attorney is responsible the party for whom he appeared, rather than the other party, should be put to his action against the attorney. The rule as adopted in this State has always been distinctly recognized as an exception founded on the general ideas of justice and policy entertained by the court in this particular class of cases. We are not aware that any great injustice has resulted from it, and we are not now inclined to disturb it. A similar rule is adopted in Vermont. *Abbott v. Dutton*, 44 Vt. 546; *St. Albans v. Bush*, 4 Vt. 58; *Spaulding v. Swift*, 18 Vt. 214; *Newcomb v. Peck*, 17 Vt. 302."

RECENT LEGAL LITERATURE.

HINTS ON ADVOCACY.

The profession will hail this work with more than satisfaction. This small volume will supply a want which has been long felt by practitioners, young and old. Among the voluminous literature which exists for the special use of the bar, it is curious how little is to be found to smooth the way of a beginner. A whole library might be filled with works on law. But where does a work exist in which the lawyer will find any advice worth having as to the conduct of a case in court—a subject certainly of the highest importance and interest to every attorney in the land? Nowhere

Hints on Advocacy, intended for Practice in any of the Courts, with Suggestions as to Opening a Case, Examination-in-Chief, Cross-Examination, Re-Examination, Reply, Conduct of a Prosecution and of a Defense in a Criminal Trial, etc. With Illustrative Cases which have occurred. By an English Barrister. Revised and adapted from the Second English Edition. By an American Lawyer. St. Louis: W. H. Stevenson. 1880.

we can truthfully answer but in this book, for strange as it may seem, it is indeed a fact that this is the only work on this extensive and all important subject. Various reasons, it has been said, may be alleged for this dearth of information on this subject. Successful men do not often care to publish the secrets of their success; it may be added, and perhaps this is more to the point, that for the most part they could not if they would. For knowledge insensibly picked up in the course of a long experience, and in the mind of the possessor himself, manifest not in the form of propositions or precepts, but as a kind of special sense or tact indicating the right thing to be done in the particular juncture, is extremely difficult to reduce to a shape that can be of much use to any one else. Besides this, there is common to nearly all arts and mysteries (as the old term itself implies) a certain jealousy of the outside world, which is distinct from any individual reticence produced by the fear of competition. It is a corporate point of honor to keep up the methods of the craft by way of internal traditions and not let the world see too much of them. In this feeling the supposition that the world will admire the results more in proportion as it knows the means less is not improbably mingled with relics of extremely ancient superstitions. But these customs are not easy to keep up at the present day. The age is curious and critical, and as the extent of men's business increases, the old methods of oral tradition are no longer sufficient for the wants of the profession itself. The time comes when the cherished traditions have to be committed to paper and print; and being once given to the press, they are given to the multitude.

"Hints on Advocacy," the volume before us, has unlocked the door. It condenses in a small manual, the hints gathered in a life of careful examination. Every class of cases is dealt with in all their stages. The author reviews in different chapters the various duties which devolve upon an advocate and makes numerous valuable suggestions, the result of a practical and extensive experience. Advice is given as to the objects to be gained by cross-examination and the mode in which it should be conducted. The different classes of witnesses generally met with are described and suggestions are given against eliciting needlessly what would injure a client. The faults of young advocates are uncovered and it is shown how frequently imprudent questions lead to the discomfiture of the case they intended to support. The work is divided into eight chapters respectively on, "Opening a Case," "The Examination in Chief," "The Cross-Examination," "The Re-Examination," "The Reply," "The Conduct of a Criminal Prosecution," "The Conduct of a Criminal Defense," "Examples of Reply; Perorations," etc. The ninth chapter contains a number of illustrative cases, and the tenth is devoted to an analysis of the great speech of Lord Cockburn, then Attorney-General, now Chief Justice of England, in the great trial of Palmer. The whole subject of how to act in court is stated under these heads, and it can no longer be said that while on every branch of practice there exist text-books innumerable, yet on this the most fascinating and the most telling of the lawyer's pursuits, there has been absolutely no recognized guide that he could study.

The American editor has adapted the work to this country, and has by dividing the chapters into sections rendered reference to the subject easier. The book contains 176 pages; is printed on elegant tinted paper and is beautifully bound. When we say in conclusion that it is sold at the low price of \$1.50 we presume that there is no lawyer young or old in active practice that can afford to be without it, considering also that

there is no school of advocacy, there are no lectures on advocacy and there is no other work on advocacy.

F.

NOTES.

—It is related that a certain wealthy man not long ago made a will leaving his large property to a trustee for his son. Subsequently he called the boy in, and reading it to him inquired if he could suggest any improvement. "Well, father," said the boy, "your intentions are right, but as things go nowadays, it seems to me it would be to my advantage if you would make the other fellow the heir and transfer the trusteeship to me." The old gentleman thought the matter over and concluded to cancel the trustee clause of his last will and testament.—A lawyer defending a young lady charged with larceny, closed his appeal to the jury thus: "Gentlemen! You may hang the ocean on a grapevine to dry, lasso an avalanche, pin a napkin to the mouth of a volcano, skim the clouds from the sky with a teaspoon, throw salt on the tail of our noble American eagle, whose sleepless eyes watches over the welfare of the nation; paste 'for rent' on the moon and stars; but never for a moment delude yourselves with the idea that this charming girl is guilty of the charges preferred against her." The jury acquitted her without leaving their seats.

—The *Irish Law Times* has an article on the somewhat obsolete subject of treasure trove. In England the concealment of treasure trove now punishable by fine and imprisonment, was formerly punishable by death. But in the good old times the insecurity of property was so great that a vast amount of valuable property was hidden away, while the insecurity of life was so great that the owners themselves were very commonly not to be found; and the consequence was that treasure trove was rather more plentiful than at present—a circumstance which encouraged the Dousterswivels of the day to pretend from their "skill or knowledge in any occult or crafty science" to discover goods lost, etc., the statute 9 Geo. 2, c. 5, to the contrary notwithstanding. Finding that treasure trove had become a rather important source of casual revenue, the Crown, of course, claimed to be entitled to those windfalls, for various excellent reasons, which may be read, with due appreciation, in the *Law Dictionary* of Sir Thomas Edlyne Tomlins, knight, founded upon that of the "industrious Giles Jacob;" but suffice it here to say that they were quite as sufficient as those in support of the law, "*de sturgeo ne observetur, quod rex illi habebit integrum; de balena vero sufficit si rex habeat caput, et regina caudam*," of which latter clause we have read the following metric-al version:

"In olden time, on Britain's coast,
Whene'er they caught a whale,
The King he had the head thereof,
The Queen she had the tail.

"The Queen the tail, because its wag
Provoked her royal smiles;—
The King the head, because he ruled
O'er all the British Isles."